No. 72-1125

IN THE

Supreme Court of the United States

October Term, 1972

A. Y. ALLEE, ET AL, *Appellants*

v.

FRANCISCO MEDRANO, ET AL, *Appellees*

On Direct Appeal From The United States District Court, Southern District of Texas, Brownsville Division

MOTION TO AFFIRM

CHRIS DIXIE
609 Fannin St. Bldg.
Suite 401
Houston, Texas 77002
713/223-4444

Attorney for Appellees

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

INDEX OF AUTHORITIES

CASES

STATUTES

No. 72-1125

IN THE

Supreme Court of the United States

October Term, 1972

A. Y. ALLEE, ET AL, *Appellants*

v.

FRANCISCO MEDRANO, ET AL, *Appellees*

On Direct Appeal From The United States District Court, Southern District of Texas, Brownsville Division

MOTION TO AFFIRM

Appellees Francisco Medrano, et al., move that the judgment of the district court be affirmed or alternatively that this appeal be dismissed on the ground that the questions are so insubstantial as not to require further argument.[1]

1. We refer often to the Appendix to the Jurisdictional Statement which begins at page 33 of the Jurisdictional Statement.

There is also a short Appendix to this Motion which is referred to as Appendix, *infra*, p. 37.

PRELIMINARY STATEMENT

The Attorney General's Jurisdictional Statement ignores the fact findings and presents a version of the case so alien to the record that we fear the Supreme Court will be misled.

In short, the district court found that five Texas Rangers, and the Sheriff of Starr County, Texas, with two of his deputies (plus two other persons) subjected the Appellee farm workers and their union to a full year of official lawlessness (including violence) in overt partisanship with the private employers who opposed this lawful organizing effort. Said the court: "The union's efforts collapsed under this pressure in June of 1967 and this suit was filed in an effort to seek relief." (App. 51-52) The challenged statutes were skillfully used by these officers to further the conspiracy.

QUESTIONS PRESENTED

1. Whether the district court's findings, which are not challenged as "clearly erroneous" by appellants, that defendants had engaged in bad-faith prosecution and harassment of plaintiffs to discourage the exercise of their constitutional rights were sufficient under *Younger v. Harris*, 401 U.S. 37, to justify the limited injunction entered against the defendants?

2. Whether the Texas statutes which the district court found to be the basis of the bad-faith prosecutions brought by defendants are unconstitutional?

STATEMENT OF THE CASE

1. The Judgment Below

The judgment below does not enjoin pending state prosecutions. Nor does it enjoin future application of these statutes at the hands of state authorities other than the specific group of peace officers who deliberately misused the challenged statutes to effectuate their conspiracy with private parties.

Narrowly drawn in one paragraph (App. 100-101), the injunction order is specifically "directed to" the five named Texas Rangers (one Captain and four Privates), the Sheriff of Starr County, Texas, and his two named deputies, and their agents, employees, successors in office, and persons in active concert with them (App. 95-96) and the two other named persons. This group is ordered not to enforce the challenged statutes against Plaintiffs and their supporters by ". . . arresting, imprisoning, filing criminal charges, threatening to arrest, or ordering or advising or suggesting that they disperse under authority of . . . such statutes. (App. 100-101)

Thus, carefully matched to the specific evils encountered, the injunction leaves the Attorney General of Texas, prosecutorial officials and private parties free to litigate under the statutes either in the pending prosecutions or in new cases. Authoritative state court constructions to save the statutes' constitutionality by defining their proper application can be obtained anytime state officials desire. Of course, other peace officers all over Texas are not covered by the injunction and may utilize the statutes as they see fit.

The main thrust of the final judgment is to render declaratory judgment as prayed for under the Declaratory Judgment Act, 28 U.S.C.A. 2201 and 2202, and to render injunctive relief as prayed for under the Civil Rights Acts, 42 U.S.C.A., §1983 and §1985 on account of the adjudicated conspiracy of the defendants to deprive plaintiffs of their civil rights, privileges and immunities protected by the Constitution of the United States by acts under color of state law.

Only the five Texas Rangers have appealed to this Court. The judgment has become final as to the other defendants.

Also, there is no challenge on this appeal to the injunctive relief against the official lawlessness found to exist and adjudicated to be in violation of the Civil Rights Acts. (App. 72; 101-102). The conspiracy facts under these acts and the harassment facts under *Younger v. Harris* requirements turn out to be the same in this case.

The Supreme Court is respectfully advised that the preservation of this unchallenged part of the judgment below is of highest importance to these Appellees who have been terrorized enough by the law officers.

2. Legal and Economic Background

The federal statute does not cover farm workers because the definition of "employee" in 29 U.S.C.A., §152, contains the proviso that the term "shall not include any individual employed as an agricultural laborer. . . ." Article 5153 of Vernon's Annotated Texas Statutes provides that it shall be lawful for any member of a union

or other organization to induce or attempt to induce by peaceful and lawful means any person to accept any particular employment, or enter or refuse to enter any pursuit, or to quit or relinquish any particular employment (Appendix, *infra*, p. 37). Article 5207a, §1, guarantees the right of every person to bargain individually or collectively with his employer (Appendix, *infra*, p. 37). Article 5154b prohibits picketing or striking in breach of a labor contract. (Appendix, *infra*, p. 37). Under these Texas statutes the right to organize an association of farm workers, the right to appeal to employees to quit any particular employment or to refuse to enter upon it, and the right to seek collective or individual bargaining are entirely consistent with state policy.

However, an employer is under no statutory duty to recognize a union selected by his employees and has no duty to bargain for a labor contract. *Flenoy v. Yarbrough*, 318 S.W.2d 15, writ ref., n.r.e. An employer may recognize a union as a representative of one, several, or all of his employeees if he desires to do so, or he may fight economically and may defeat union organization by replacing strikers, or by other lawful means. In short, Texas law looks to the survival of the fittest economically. In this case it was stipulated that the ultimate objective of the farm workers was in keeping with the public policy of the State. Indeed, their efforts to solicit support were exactly the last resort that Texas statutes contemplate in view of employer resistance to union organization.

Starr County, Texas, one of the poorest in the nation economically, is located deep in the Rio Grande Valley. This labor dispute involved several large growers which

are shown by the record to cultivate thousands of acres with hundreds of farm workers employed during harvest seasons of the year. Largely these farm workers are of Latin-American extraction of both U. S. and Mexican residence and citizenship. A substantial part of the labor force is transported to the farms in bus loads.

3. The Harassment Facts

Regardless of the broad experience of the Justices of this Court, we think Your Honors have not seen a case like this.

The district court found that the farm workers in Starr County attempted for one full year, June 1, 1966 to June 1, 1967, to exercise their rights of citizenship, but during the entire year they were systematically set upon, threatened, dispersed, arrested, jailed, detained, manhandled and even beaten. Throughout, the law officers intertwined their enforcement of these unconstitutional statutes. The district court's findings of fact are set out at App. pp. 34-55.

Substantially as found by the district court, the farm workers' travail was this:

Union organization started June 1, 1966. Within one week, on June 8, 1966, Eugene Nelson was stopped from soliciting the support of agricultural workers at the Roma International Bridge, arrested without warrant or charge, jailed for several hours in the county jail of Starr County, counseled in a menacing way by the County Attorney, then released without charge. (App. 38-39)

As organization developed in the summer of 1966, the Sheriff's office commenced the distribution of a viciously anti-union weekly newspaper, *La Verdad*. Weekly, Deputy Sheriffs went to the bus station in official cars to pick up these newspapers, took them to the Sheriff's office and prepared them for distribution to the public, including house-to-house distribution by deputy sheriffs. The district court attached copies of *La Verdad* to its opinion. The headlines said: "ONLY MEXICAN SUBVERSIVE GROUP COULD SYMPATHIZE WITH VALLEY FARM WORKERS," "UNION LEADERS IN VALLEY ARE VAGRANTS," and "GOVERNOR CONNALLY SHOULD DO SOMETHING ABOUT VALLEY STRIKE." The Supreme Court will please bear in mind that the deputy sheriff distributors of these weekly newspapers were the law officers who administered the statutes here challenged. (App. 49)

On October 12, 1966, about 25 farm workers appeared on U. S. Highway 83 adjacent to the Rancho Grande Farms to solicit support of the workers in the fields. Deputy Sheriff Raul Pena dispersed these persons by threatening to arrest them for disturbing the peace in violation of Article 474. He testified that these persons were calling to the workers in the fields and disturbing them by the use of "loud and vociferous language." The farm workers did disperse under this threat, but William Chandler was arrested and charged with disturbing the peace when he told Pena that he had no right to order these people to disperse. Pena charged Chandler with the use of "loud and vaciferous language" under Article 474, jailed him, and placed him under $500 bond although the maximum fine for the offense was

$200. When two union supporters went to the courthouse to make bond for Chandler, a deputy sheriff cursed them and told them that if they did not leave they, too, would be jailed. (App. 39-40)

On October 24, 1966, Domingo Arrendo, then under arrest, uttered the words "Viva La Huelga" (long live the strike) in the courthouse, whereupon a deputy sheriff slapped him and put a cocked pistol to his head. The deputy ordered him not to utter those words in the courthouse again. (App. 40)

On November 9, 1966, Deputy Sheriff Roberto Pena filed misdemeanor charges of "secondary strike" under Article 5154f against 10 union adherents on account of their picketing at the packing sheds of the farm owners. Texas Rangers were called from afar to serve the warrants of arrest on the 10 persons. Two Texas Rangers, Frank Harger and Jerome Preiss, arrested two union members and put them in a police car In the car the Rangers told the two farm workers that they could go to work for La Casita Farms for $1.25 an hour (the union objective), that later they could get a more peaceful union, and that the Rangers were there to break the strike and would not leave until they had done so. (App. 40-41)

We invite the Court's attention to the manipulation of the Texas statute in these November 9 charges. Article 5154f renders either picketing or striking "secondary" (and thus illegal) if not part of a "labor dispute." In turn, a "labor dispute" is limited to a controversy between an employer and a majority of his employees.

Texas courts have long since declared the "secondary picketing" phrase of Article 5154f to be unconstitutional

since simple primary picketing by a minority of employees which violates no public policy of the State is constitutionally privileged. *Ex Parte Henry,* 215 S.W.2d 588; I.U.O.E. v. Cox, 219 S.W.2d 787; *General Labor Union v. Stephenson,* 225 S.W 2d 958. Notwithstanding the constitutionally privileged character of this primary picketing at the packing sheds, the November 9th charges presented an ingenious new angle. The pickets, the charges alleged, did "aid and abet" a "secondary strike" when the engineer and fireman of the Missouri Pacific Railroad declined to cross the picket line to enter the packing shed area. After all, the engineer and the fireman were certainly less than a majority of the railroad's employees, and, therefore, the picketers, by picketing, aided and abeted them in a "secondary strike." This was a cute way around the cited *Henry, Cox* and *Stephenson* decisions and furnished a pretext for the arrest of union adherents for peaceful and privileged primary picketing. Article 5154f provides a penalty up to six months in jail for its violation. Of course, these charges have never been set for trial in the intervening seven years.

But, the lesson could hardly be misunderstood by the union sympathizers. If they could be prosecuted for "aiding and abetting a secondary strike" in picketing at a primary situs, then picketing would be dangerous wherever done. Six months in jail does give one pause.

On January 26, 1967 five union sympathizers were arrested on the banks of the Rio Grande River while soliciting the employees of Trophy Farms to join the union. The charge this time was Abusive Language in violation of Article 482 in that they did curse or abuse

or used violently abusive language toward the workers under circumstances reasonably calculated to provoke a breach of the peace. That evening approximately 20 union supporters gathered at the courthouse to conduct a prayer vigil. Two members of the group, Reverend James Drake and Gilbert Padilla, mounted the courthouse steps and engaged in prayer. Deputy Sheriff Raul Pena ordered the group to leave the courthouse grounds and they did so, but Drake and Padilla remained on the steps. The deputy thereupon arrested them for Unlawful Assembly in violation of Article 439. (App. 41-42)

No Texas statute prohibits the presence of this group on courthouse grounds By stipulation it was established that the courthouse grounds had been used in the past for night rallies and dances by custom and practice in the particular county. The court below found this to be one of the several episodes of selective enforcement by the defendants.

On February 1, 1967, two Catholic priests, Father Smith and Father Killion, and three other priests, assembled in a wooded area on private property owned by one Thomas Bazan adjacent to the property of La Casita Farms. The five priests solicited the workers in the fields to join the Union. They were promptly arrested for Disturbing the Peace and taken to a magistrate. (App. 42-43)

There the magistrate, B. S. Lopez, Justice of the Peace, informed the priests that if they were ever brought into the same court under the same charge they would be put under a peace bond, and if they couldn't meet the bond, they would be put in jail. Relative to these arrests the Attorney General of Texas made the following statement

before the three judge court. He said in Defendants' Post Hearing Brief:

> "Based on the testimony of the two Catholic priests, Father Smith and Father Killion, everyone present could have been charged with the violation of Article 5154d, mass picketing, with Articles 439 and 449, unlawful assembly, and possibly under Article 482, abusive language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has 'punch to it and an edge on it.' " (Appendix, *infra*, p. 38)

As of May 11, 1967, the farm workers had developed important support on the Mexican side. As a result, on that day no Mexican farm workers came across the Rio Grande river to do work for the growers. This development triggered intense activitity on the part of Texas Rangers.

On the morning of May 11, 1967, a group of farm workers supporters left Roma Bridge headed south for the Camargo Bridge. On the way their car was stopped by a Texas Ranger although the car was not speeding or violating any other traffic law. The driver of the car was arrested for not having a driver's license. On the same day, Ranger Captain Allee solicited union adherents to go to work for $1.25 per hour. (App. 43)

On May 12, 1967, Texas Rangers received a complaint from La Casita Farms that the union people were on private property owned by one Solis adjacent to the property of La Casita. The Texas Rangers promptly went to the scene of the solicitation. First they made investigation whether the union supporters had permission from

Mr. Solis to be on his private property. Then the Texas Rangers caused the pickets to spread out 50 feet apart. Reverend Edward Krueger, a union sympathizer, stepped off the distance to comply with the Rangers' instructions. All this took place in the woods. (App. 43-44)

Later that day, May 12, Eugene Nelson went to the Sheriff's office to complain that the Texas Rangers were acting as a private police force for La Casita Farms. As a result, Nelson was arrested and charged with threatening the life of certain Texas Rangers. Defendant, Captain Allee, testified that he did not take the "threat" seriously, he directed that charges be filed against Nelson in order to protect the Texas Rangers from criticism if something happened to Nelson. After Nelson was jailed on this charge, the Sheriff's deputies unlawfully refused to accept a tendered appearance bond although they knew that the bond was signed by a prominent landowner in Starr County, one Joseph Guerra. The Texas Rangers who arrested Nelson on this charge told him that he had lived a charmed life in Starr County long enough and warned him not to go too near the river or he might end up floating down. (App. 44)

On May 18, 1967, a group of about 22 pickets assembled near the entrance of Trophy Farms on U. S. Highway 83 to solicit support from workers in the field. In response to a call from Trophy Farms, Ranger Captain Allee went to the scene and arrested these persons because he found these pickets within a radius of 50 feet of the entrance of Trophy Farms and also within 50 feet of each other in violation of the mass picketing statute.

On May 26, 1967, 14 union sympathizers were arrested in two groups at Mission, Texas. Some of the union

sympathizers had intended to picket on the main street of Mission, Texas, at its intersection with the Missouri Pacific Railroad tracks. Texas Rangers arrested and charged them with trespassing on private property, but later this charge was changed to Unlawful Assembly. Three days later the charges were changed to secondary picketing and boycott charges filed by agents of the Missouri Pacific Railroad.

The first group of 10 persons was arrested by Texas Rangers because they were preparing to picket at the intersection of the public street with railroad tracks, although no train had arrived. At the same time, union sympathizer Francisco Medrano was arrested for taking pictures for a union publication, and his camera was pushed into his face by a Ranger. The Rangers also confiscated all picket signs.

Later the same evening, Reverend Edward Krueger arrived at the scene and asked the Ranger Captain the reason for the previous arrests. Allee replied "for trespassing on private property." Then, as a train passed across the main street of Mission, the Ranger Captain went to Reverend Krueger and physically grabbed him saying, "I'm sick and tired of seeing you around." Allee seized Krueger by the collar and the seat of the pants and took Krueger to the railroad track where he held Krueger's head within a few inches of the passing freight train. Another Ranger did the same to another union sympathizer. When Mrs. Krueger took a picture of this mistreatment of her husband, a Ranger arrested her, confiscated her camera and exposed the film. Krueger and Dimas were manhandled further and others were arrested, one of them Doug Adair, who was told by a Ranger,

"You look like you want to be arrested." The four persons were then put in a Ranger car for a terrifying ride at a speed of 90 to 100 miles an hour to Edinburg, Texas, where they were jailed. These persons, too, were charged with unlawful assembly, then secondary boycott. (App. 44-45)

On May 31, 1967, the Rangers arrested 13 persons for mass picketing in the woods at the west periphery of La Casita Farms. Ranger Captain Allee testified that he arrested these persons because they were gathered together in a group and thus were picketing in a forbidden manner in his sight and presence. In this connection, three of the pickets had moved southward along a country road to follow the work force as it moved through the field, but the other eight who were bothered by the heat waited with their cars under the shade of some trees with their signs put away. Captain Allee arrested the first three pickets and then directed that the eight others under the tree likewise be arrested for mass picketing. After all, they were bunched up. (App. 46-47)

On the night of June 1, 1967, Ranger Captain Allee with gun in hand conducted in Rio Grande City, Texas a conspicuous and terrifying man hunt for Magdaleno Dimas, a union supporter. The man hunt led to a private residence which Texas Rangers surrounded, then broke into after calling out the Justice of the Peace to issue a curbside search warrant. After breaking in, they administered a merciless beating to Dimas and another.

The man hunt had been conducted without known reason, without charges, and without warrant, but after Dimas was jailed, an official of La Casita Farms, de-

fendant Jim Rochester, was called out in the night to file appropriate charges. Dimas was charged with disturbing the peace at La Casita Farm Shed No. 1 by yelling, "Viva La Huelga." (Long live the strike). (Pl. Exhibit 7. 22D) and by rudely displaying a deadly weapon. (Pl. Exhibit 7. 22C). Other evidence established that during the daylight hours of the same day, Dimas had walked along the highway past La Casita's packing shed with a hunting rifle in hand, returning from a bird hunt. (App. 47-49)

Also on June 1st three more union supporters picketing at the La Casita shed were arrested for mass picketing and secondary boycott. The charge of mass picketing was filed because they were three in number. The secondary boycott resulted from the fact the pickets were near the premises of the Missouri Pacific Railroad (the tracks which enter La Casita's shed), an employer which had no labor dispute with its employees.

So, on June 1, 1967, the Union announced that it would discontinue its organizing efforts and seek relief from the courts. This suit followed promptly.

All the above facts and many others were proved to the district court which was unanimous in making uncommonly strong fact findings. The evidence showed 8 cases of overt official partiality, 5 cases of manhandling by officers, 7 cases of unwarranted prosecution, 3 cases of bonding abuses, and 56 arrests for First Amendment activity, plus numerous dispersals of persons or interference with them where no charges were filed. Physical brutality was administered on at least 5 union leaders.

None of the pending prosecutions has ever been set for trial.

This record satisfies the stringent requirements of *Younger v. Harris,* 401 U.S. 37 (1971), and companion cases and answers Appellants' argument at pages 26-31 of their Brief that these law officers should not be restrained from future use of the statutes because of the pendency of the state cases. The District Court's review of these harassment facts is at Appendix pp. 34-55.

The Attorney General's indifference to the fact findings and to the official lawlessness behind them is fresh evidence that some of our state officials still do not wish to shoulder responsibility for the control of ugly law enforcement. The alleged misconduct attributed to farm workers at pp. 7-9 of the Jurisdictional Statement is made practically from the whole cloth. Indeed, the district court found at App. p. 50 that the strongest evidence of an assault on anyone by the farm workers during the entire year was an attempt by one of them to reach through an open window of a passing truck to grab a nonstriker by the coat on December 28, 1966. Although it was claimed that property destruction and the burning of a railroad bridge resulted from the strike, no evidence was presented specifically in this respect, and the district court so found (App. 37-38).

Without purporting to whitewash the activities of the farm workers and their sympathizers, the district court found that the law officers stepped over the line of neutral law enforcement and entered the controversy on the employers' side (App. 51). The law officers were found to have deliberately intended to break the strike and to

prevent persons from supporting it by using their law enforcement powers to this end by instituting these prosecutions in bad faith and for the purpose of harassment (App. 55).

Exhibit 7.11B shows the place on the bank of the Rio Grande River where five farm workers stood with loudspeaker to solicit workers in the field of La Casita Farms. The river is in the background. La Casita property stretches behind camera. The farm workers were arrested for abusive language and their loudspeaker was confiscated for the day. The Attorney General advised the district court that the five could also have been charged with Unlawful Assembly and Mass Picketing (see Appendix p. 38, *infra*).

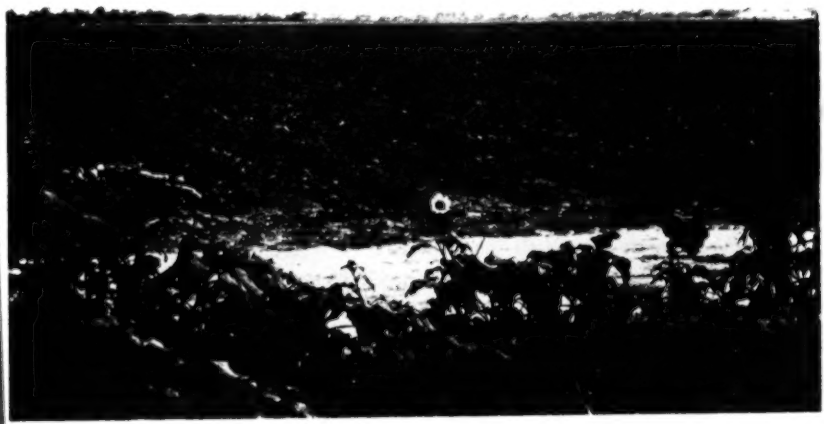

Exhibit 7.13B is taken from the edge of the Bazan property and overlooks La Casita Farms. On February 1, 1967, five Catholic priests stood on the Bazan property at the camera's place on the near side of the dirt road and called out to the workers in the fields to join the union. They were arrested for disturbing the peace. The Attorney General advised the district court that the priests were also guilty of mass picketing, unlawful assembly and abusive language in the use of the Spanish word for squirrel (scab). (See Appendix p. 38, *infra*).

Exhibit 7.17F shows Solis property on the right and La Casita Farms property on the left. On May 21, 1967, law officers required picketing farm workers on Solis property to space themselves out every 50 feet. On May 31, 1967, 13 persons were arrested for mass picketing in this area, 10 of them because they were bunched up under the shade of a tree.

Exhibit 7.18L, a picture taken by the Texas Rangers, shows the actual scene viewed by the Rangers on May 18, 1967, when they arrested 22 persons near the entrance to Trophy Farms on U. S. Highway 83. The pavement shows the broad shoulder of the road. Trophy Farms is one mile to the right (west) along the dirt road shown in the center. The other arrestees were in groups along the shoulder of the road.

STATUTES INVOLVED

Mass Picketing Statute

Section 1 of Article 5154d uses the epithet "mass picketing," but this is another of those "mere labels of state law" which disguises interference with innocent First Amendment communication and association. *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964). The statute is patently unconstitutional because of its over-breadth in prohibiting human beings who communicate by picketing or by assembly from gathering together in greater numbers than two at any time or any place and without consideration of the surrounding physical conditions or the size and nature of the employer's operations. The statutory terms "picket" and "picketing" reach every person who acts for an organization who is present for the purpose of inducement, observation or persuasion. So the prohibition is not limited to those who carry picket signs but instead includes everyone who has a sufficient interest in the matter to be present to see what is going on. The same is true of the other absolute prohibition in the statute against "any character of obstruction" without reference to the extent or reasonableness of it. The unconstitutionality of the statute is demonstrated in the opinion of the district court, App. pp. 59-64.

The second respect in which the statute is unconstitutional is its violation of the Equal Protection Clause of the Fourteenth Amendment. The offense of mass picketing can only be committed by pickets or persons who are "stationed by or act for or in behalf of any organization." The statutory definitions of "picket" and "picketing" make it clear that persons who are not stationed by or acting

for or in behalf of an "organization" may gather and picket without reference to the numbers and distance or the obstruction formula of Article 5154d. Both the 50-foot phase and the obstruction phase of the statute incorporate these statutory definitions:

> "The term 'picket' as used in this Act shall include any persons *stationed by or acting for and in behalf of any organization* for the purpose of inducing, or attempting to induce, anyone not to enter the premises in question or to observe the premises so as to ascertain who enters or patronizes the same . . ." etc. (Emphasis added)
>
> "The term 'picketing,' as used in this Act, shall include the stationing or posting of one's person or of others *for and in behalf of any organization* to induce anyone not to enter the premises in question, or to observe so as to ascertain who enters . . ." etc. (Emphasis added)

A similar distinction in the regulation of picketing was recently declared invalid. *Police Department of City of Chicago v. Mosely,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972). In *Mosely* the court held it to be unconstitutional under the Equal Protection Clause to outlaw all picketing within 150 feet of the school, except labor picketing. The reasoning of *Mosely* is fully applicable here. Discrimination among pickets which is based on whether they represent an organization is no more "tailored to a substantial government interest," 408 U.S. at p. 102, than discrimination based upon "the contents of their expression." *Id.* Indeed, the distinction which the statute draws penalizes "the right of individuals to associate to further their personal beliefs." *Healy v. James,* 408 U.S. 169, 181 (1972). Also rejected in *Mosely* was

a state argument to the effect that non-labor picketing, as a class, is more prone to produce violence than labor picketing. The court responded that the Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to legitimate objectives and that abuse of picketing must be dealt with even-handedly regardless of the subject matter of the picketing.

The constitutionality of the statute was challenged on this ground by plaintiffs by pleading and by pretrial memorandum. The district court did not specifically mention this phase of the case, no doubt because the decision below was handed down on the same day that the Supreme Court decided *Mosely* and *Grayned* on June 26, 1972. Nevertheless, the unconstitutionality of the statute on this ground is clear.

The broad terms of this statute permitted the Texas Rangers to go into the woods to interfere with the farm workers picketing on the Solis property on May 12, 1967. Just so they were authorized by the statute to arrest 13 persons in the wooded areas west of La Casita Farms on May 31, 1967. The absurdity of arresting 10 Mexican farm workers as they lolled in the shade of a tree in the woods was legitimized by the language of the statute. The Rangers were likewise justified in arresting 22 pickets on the side of the road on U. S. Highway 83 on May 18, 1967, without reference to any actual obstruction or inconvenience to anyone.

As we have seen, Texas statutes relegate these farm workers to the economic contest. There is no rational reason why bus loads of farm workers transported in and out of the farms in the employers' buses should see only two lonesome pickets soliciting their support.

It was natural for the growers to call out the peace officers to arrest the small groups of farm workers on each of the above occasions. The statute was a handy tool, indeed, to break organizational cohesion. A more oppressive legal instrument with which to thwart the momentum and debase the credibility of the union effort is hard to imagine.

Secondary Strike, Picketing and Boycott

Article 5154f uses the terminology of "secondary" activity but, in fact, it proscribes inoffensive primary picketing and work stoppage. Here again is the disguising label.

The statute prohibits all picketing and every work stoppage unless engaged in by a majority of an employer's employees or, alternatively, by a majority of the union members employed by the employer. This is so regardless of the purpose or circumstances of the picketing or the stoppage.

Mechanically the statute accomplishes this result by declaring that all picketing and every strike must be incident to a "labor dispute." Otherwise it is "secondary picketing" or a "secondary strike." By definition of the statute, the term "labor dispute" requires a majority.

The Texas Supreme Court held the secondary picketing provisions of the statute to be unconstitutional in a series of cases. *Ex Parte Henry*, 215 S.W.2d 588; *I.U.O.E. v. Cox*, 219 S.W.2d 787; *General Labor Union v. Stephenson*, 225 S.W.2d 958; *Cain, Brogden & Cain v. Local Union No. 47*, 285 S.W.2d 942. In these cases the court held that peaceful picketing by a minority or by strangers

which violates no state policy is constitutionally privileged even though the picketing may elicit sympathetic response from others. The Texas court's decisions culminated in 1956 in *Dallas General Drivers v. Wamix*, 295 S.W.2d 873, a case in which the court turned its back on Article 5154f and resorted instead to the common law to identify genuine secondary activity and to define the circumstances under which secondary activity should be permitted or enjoined in Texas.

Nevertheless, 10 years later the defendant law officers belatedly exhumed the criminal provisions of Article 5154f for use against these farm workers. The holding of unconstitutionality by the district court in this case (App. pp. 64-69) is in part a restatement of what the Texas Supreme Court had already held in the cited Texas cases.

As stated, the Texas court disposed of the "secondary picketing" provision long ago. As to "secondary strike" the statute prohibits every work stoppage by two or more employees unless they constitute a majority of *their* employer's employees. So, practically every sympathetic response by one or more employees to a picket is prohibited wherever it occurs. And further, the statute not only prohibits this sympathetic response but it also prohibits "the establishment, calling, participation in, aiding or abetting" of it.

It was obvious to the world, we think, that the above cited decisions of the Texas court which upheld the constitutional privilege to picket in the face of the "secondary picketing part of Article 5154f could not be circumvented because the picketing elicited sympathetic response from persons who came to the area of the picketing. Nevertheless, the November 9, 1966 criminal misdemeanor infor-

mations charged that ten fm workers did "participate in and abet a secondary str" by picketing because two railroad employees declinedo cross the picket line, and this was a temporary stoppe of work by two employees of the Missouri Pacific Raiad Company who were not a majority of the employeesf the railroad.

The bad faith of such charge is obvious, but the broad language of the "sondary strike" phase of the statute furnished the prete for the law officers to do indirectly what the Texas ecisions had told them they could not do directly.

Also, the cited Texas cas had given full recognition to established principles of e constitutional law of picketing. First, picketing for a lful purpose cannot be denied because only a few are arieved or become activated. Second, lawful primary pketing does not become unlawful because persons wo come to the area of the dispute prove to be sympaetic to one side or the other. Third, damages, if any, sulting from the exercise of lawful and constitutionallyuaranteed rights are *damnum absque injuria*. And, specially, the definition of "labor dispute" was declared unastitutional.

Contrary to these prinoles, the "secondary boycott" phase of Article 5154f prdbits every plan or concert of action by two or more perns to cause injury or damage to any person by various eans.

Thus, subparagraph (2 (the most conspicuously absurd provision) literally sa that any plan of two persons to cause injury to anotheby picketing is unlawful (regardless of circumstances r motive).

Subparagraph (1) literally says that any plan by two persons to cause injury to another by withholding patronage, labor or other beneficial business intercourse is unlawful (regardless of circumstances or motive).

Subparagraph (3) was not ruled upon or involved in this case.

Subparagraph (4) literally says that any plan by two or more persons to cause injury to another by instigating or fomenting a strike is illegal (regardless of circumstances or motive).

Subparagraph (5) says that any plan of two persons to cause injury to another by interfering with the free flow of commerce is illegal (without reference to the circumstances or motive).

Subparagraph (6) prohibits "any other means" of causing or attempting to cause one employer to inflict damage to another. Literally this prohibts peaceful solicitation of one employer not to make deliveries to another through a lawful primary picket line.

And in all cases any degree of injury or harm, however slight, suffices to make the provision applicable. The dragnet terms of the "secondary boycott" phase of the Texas statute do not square with the reasonable precision of regulation which is the touchstone in the First Amendment area. It was used to charge 14 persons with secondary boycott on account of their supposed intent to engage in either peaceful picketing or word-of-mouth solicitation on the main street of Mission, Texas, to apprise the public of the existence of a labor dispute or

to interfere with the free flow of commerce conducted by the Missouri Pacific Railroad Company.

The district court was fully advised that the Texas bible of secondary picketing and boycott law is the cited *Dallas General Drivers v. Wamix,* 295 S.W.2d 873 decided in 1956. In that case the court upheld the legality of ambulatory picketing in certain circumstances which are not compatible with the dragnet terms of Article 5154f. It laid down the public policy of Texas relative to the inducement of employees of neutral employers to give aid and sympathy to labor disputants. It specified two "important factors" by which the legality of picketing is to be judged when it has secondary effects, namely, (1) the good faith intent of the union or the employees to assert pressure only on the primary employer so that the effect on neutrals is purely incidental, and (2) the balancing of relative rights of all affected parties against the harm to the other parties and to the public from permitting or restraining the picketing. The determination was committed to the sound discretion of the equity court with the observation that only rarely would the issue be decided as a law question. 295 S.W.2d at 884. This balancing procedure is quite similar to the approach of this Court in *I.B.T. v. Vogt,* 354 U.S. 284 (1957), with its evaluation of "the balance struck by a state between picketing . . . and competing interests of state policy." 354 U.S. at 290.

Thus, the viable secondary picketing, secondary strike and secondary boycott law of Texas was not disturbed by the decision of the district court. The *Wamix* decision still defines the State's stringent regulation of secondary activity in common law terms at the hands of the equity court.

Since 1956 the Texas Legislature has not bothered to redefine secondary prohibitions in constitutional terms, apparently content with *Wamix*.

The district court in this case was confronted with the exhumation by the law officers of the criminal provisions of this obsolete and unconstitutional statute for the bad faith purpose of harassment.

The district court's demonstration of the unconstitutionality of Article 5154f is at Appendix pp. 64-69.

Unlawful Assembly

The district court's demonstration of the unconstitutionality of Texas Penal Code Article 439, the Unlawful Assembly statute, is at Appendix 74-77.

At pp. 22-26 of the Jurisdictional Statement is Appellants' argument in support of this statute, which is somewhat inept because it seems to say that Article 439 cannot stand alone. It can, however, by the express provisions of Texas Penal Code Article 452 which is set out below. In any case, the district court assumed for purposes of discussion that the "right" to be protected from deprival or disturbance is one which the State may legitimately protect (App. 75).

Article 439 of the Texas Penal Code, Unlawful Assembly, provides as follows:

> An "unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

Article 452 provides:

> If the purpose of the unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be fined not more than two hundred dollars.

This ancient statute, enacted in 1879, is not "directed to inciting or producing imminent lawless action" by advocacy but also encompasses (1) guilt by association, (2) abstract advocacy, (3) intent to aid "in any manner" the deprivation of any person of any right illegally, and (4) finally, the intent to aid in any manner the disturbance of any person in the enjoyment of any right.

The statute does not square with First Amendment protection of the right of assembly. *Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Healy v. James,* 408 U.S. 169 (1972).

Texas courts have not limited the statute to hard core or lawless action. For example, in *Brisco v. State,* 341 S.W.2d 432 (1961), cited in the Jurisdictional Statement at p. 24, the court held that the indictment should specify whether the offense involved an intent to use violence to disturb the victim or whether it involved an intent to use means other than violence to disturb the victim in his rights.

Interestingly, the Jurisdictional Statement at p. 23 makes the following argument:

> "Thus this portion of the statute makes criminal a conspiracy to do something that the law of the State, including the civil statutes and the common law, prohibits."

Literally, the statute does indeed define unlawful assembly to include an intent of three or more people to aid each other to disturb some person in the enjoyment of one of his common law rights.

In this case Reverend James Drake and Gilbert Padilla were arrested for unlawful assembly for praying on the courthouse steps on January 26, 1967. It was stipulated that the courthouse property had been used in the past for nighttime rallies of politicians and for dances. No Texas statute prohibited the presence of these men at the scene of their prayers. The disturbance of the "right" of another is easy to supply—perhaps the right of a janitor, a jailer, or an atheist enjoying his peace on the grounds.

Again on May 26, 1967, ten union sympathizers at one time and four other union sympathizers at a later time were arrested for unlawful assembly on the main street of Mission, Texas. The first group of ten had the intent to aid each other in picketing although the picketing had not started. The second group of four arrived later with the intent to aid the first ten, although the first ten had already been taken to jail. The "offense" or the "disturbance of a right" could be supplied by the Texas secondary boycott statute. That statute makes it a crime for any two persons to plan to cause injury to another "by picketing." Or, the offense could be supplied by another provision of that statute which prohibits the plan of any two persons to cause injury to another by interfering with the free flow of commerce.

Again on February 1, 1967, five Catholic priests assembled in a wooded area on private property adjacent to La Casita Farms. There they solicited the workers in

the field to join the union and were promptly arrested for disturbing the peace. As pointed out, the Attorney General of Texas advised the court in its post-trial memorandum that "everyone present could have been charged with the violation of Article 5154d, mass picketing, with Articles 439 and 449, unlawful assembly, and possibly under Article 483, abusive language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has punch to it and an edge on it." (See Appendix, *infra*, p. 38)

This unlawful assembly statute in addition to its overbreadth lends itself to all manner of unpredictable and selective enforcement.

Abusive Language

The district court's demonstration of the unconstitutionality of Texas Penal Code Article 482 is at Appendix 72-74. The statute provides:

> "Any person who shall in the presence or hearing of another curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace, shall be fined not more than one hundred dollars."

In all material respects this statute is identical to the Georgia statute in *Gooding v. Wilson*, 405 U.S. 518 (1972).

At Footnote 22 (App. p. 83) the district court reviewed Texas decisions to show that this statute has not

been limited to the kind of "fighting words" contemplated by *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). The Jurisdictional Statement does not even address itself to the cases discussed in Footnote 22 (J.S. 21-22).

The constitutional posture of these plaintiffs is far superior, however, to that of the defendant in *Gooding v. Wilson, supra.* In this case on January 26, 1967, five farm workers standing on the banks of the Rio Grande River were addressing themselves to a large number of workers in the fields by means of a loudspeaker. Deputy Sheriff Roberto Pena arrested all five for abusive language and confiscated their loudspeaker until the next day.

We do not have here the individual, face-to-face delivery of severely insulting language which *Chaplinsky* contemplates. To the contrary, there was distance and also the impersonal aspect stemming from the group attitude of the union supporters on the one hand in contrast to the group indifference or rejection of their cause by the workers on the other.

The Texas court applies the abusive language statute in cases other than direct personal abuse by one person to another of a provocative kind which will likely provoke a breach of the peace in the circumstances. In addition to the cases cited in Footnote 22 of the district court's opinion, the Texas court has held that the abusive language statute was violated when the defendant on his own premises shouted to someone in his house: "Call Mitchell, these god damned bastards got guns." These remarks were not even addressed to the two law officers referred to who were crouched behind vehicles parked in the defendant's driveway. Under this interpretation, the statute is violated

even though the person referred to would not commit a responsive breach of the peace because of official position and responsibility. As in *Gooding v. Wilson, supra,* this leaves the standard of guilt to the creation of the trier of fact in each case. *Duke v. State*, 328 S.W.2d 189 (1959).

The Texas Abusive Language Statute is a natural implement for hostile law officers to utilize oppressively in the group animosities which inhere in labor disputes. Unfriendly law officers can be quick to conclude that the persuasions, arguments and appellations of the union supporters are "abusive" to a degree which might be reasonably calculated to provoke a responsive breach of the peace by the nonstrikers. As previously pointed out, at or about the same time one of five Catholic priests used the Spanish word "esquirol" which literally means "squirrel" but is the general equivalent of the English word "scab" in the context of a labor dispute. The Attorney General expressly advised the Court that the abusive language statute was violated by the use of this word on the occasion in question.

SUMMARY AND CONCLUSION

Appellants have submitted the following basic points in support of this Motion to Affirm or Dismiss:

First, the harrassment fact findings are unchallenged and clearly sufficient to justify, if not require, the intervention of the federal court under *Younger v. Harris.*

Second, the injunctive relief granted is appropriately confined to the evil encountered by the district court and leaves state authorities free to proceed in pending prosecu-

tions against these Appellees and in future prosecutions against anyone. Without intending to be disrespectful to state officials, we suggest that the failure to seek appropriate elucidating constructions from state courts or appropriate legislative corrective action amounts to official laziness. It seems easier to pound the table in the Supreme Court in the name of State Soverignty.

Third, the four statutes involved here are clearly out of bounds constitutionally. This is validated in the case of each statute by actual application of it to protected speech and assembly in bad faith. In summary:

1. The 50-foot requirement, however reasonable for some situations, is plainly absurd for others. We have seen the unfair application of the statute for the arrest of farm workers in small groups in rural territory when no obstruction of any kind existed and when the 50-foot spacing of pickets was preposterous. Additionally, the statute is readily identified to be unconstitutional under the Equal Protection Clause since it applies the numbers, distance and obstruction formula only to pickets and persons who act on behalf of an organization while leaving independent pickets and persons free of these restrictions even though they may act in the same numbers, time and place. *Police Department of the City of Chicago v. Mosely, supra,* fits the statute completely.

2. The secondary picketing and secondary strike provisions have already been invalidated by the Supreme Court of Texas, because they apply the mechanical and artificial criterion of minority versus majority to determine the legality of all picketing and every work stoppage. The secondary boycott provision has already been rendered

obsolete by the Texas Supreme Court in the *Wamix* decision, *supra.* The decision of the district court does not disturb viable secondary boycott law of Texas. It does prevent further treacherous use of the obsolete criminal provisions by these particular law officers.

3. The unlawful assembly statute is readily identified to be unconstitutional under *Brandenburg v. Ohio, supra,* and *Healy v. James, supra.*

4. The abusive language statute is readily identified to be unconstitutional under *Gooding v. Wilson, supra.* Moreover, the actual application made of this statute to the impersonal labor dispute arena confirms that *Chaplinsky* principles do not save this particular statute.

The organizational effort in this case began in June 1966 and ended one year later when this suit was filed. This case was tried to the three judge court in 1968. The court held this case under advisement for four years while the Supreme Court heard argument and re-argument in *Younger v. Harris* and companion cases.

The opinion of the district court rendered in July 1972 is in careful harmony with *Younger v. Harris.* The statutes were declared invalid only in the light of compelling precedents in the First Amendment area and only upon clear proof that the statutes had actually been used improperly to suppress constitutional conduct in a bad faith program of the law officers to take sides with the growers in the industrial dispute.

It is submitted that this case is sufficiently clear that it does not require plenary consideration by this Court or further delay.

Respectfully submitted,

CHRIS DIXIE
609 Fannin St. Bldg.
Suite 401
Houston, Texas 77002
713/223-4444

Attorney for Appellees

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Affirm or Dismiss was mailed to Hon. John Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 16th day of April, 1973.

Chris Dixie

APPENDIX TO MOTION TO AFFIRM

Art. 5153. Other Rights and privileges

It shall be lawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment or to enter or refuse to enter any pursuit or quit to relinquish any particular employment or pursuit in which such person may then be engaged. Such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

Art. 5154b. Liability of labor organizations for damages

Section 1. A labor organization whose members picket or strike against any person, firm or corporation shall be liable in damage for any loss resulting to such person, firm or corporation by reason of such picketing or strike in the event that such picketing or strike is held to be breach of contract by a Court of competent jurisdiction.

Art. 5207a § 1

The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

EXCERPT FROM PAGE 20 OF ATTORNEY GENERAL'S POST HEARING BRIEF TO THE DISTRICT COURT:

"In the next scene, *Paragraph 7.11*, Plaintiffs offered no evidence to rebutt (sic) the fact that they were using a loud speaker and calling to Augustine Lopez and Fredrico Pena and other workers by using 'the foulest words known to that language in this area.' . . . Assuming the correctness of this uncontroverted testimony, Plaintiff could clearly have been charged under Articles 482, Abusive Language; 439, 449, Unlawful Assembly; 455, 464, 466, 469, Rioting Statutes; and 5154d, V.C.S." (mass picketing).

EXCERPT FROM PAGE 22 OF ATTORNEY GENERAL'S POST HEARING BRIEF TO THE DISTRICT COURT:

"On February 1, 1966, the instance complained about in *Paragraph 7.13* occurred. In reviewing the record, there is some doubt as to whether or not Penal Code, Article 474 applies. Based on the testimony of the two Catholic priests, Father Smith and Father Killion, everyone present could have been charged with violation of Article 5154d, Mass Picketing, with Articles 439 and 449, Unlawful Assembly; and possibly under Article 482, Abusive Language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has 'punch to it and an edge to it.' "